Supreme Court, U.S.
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No. 96-1937

In the Supreme Court of the United States

OCTOBER TERM, 1996

JACKSON SQUARE ASSOCIATES, PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the Department of Housing and Urban Development correctly determined that petitioner was ineligible for a special rent adjustment of six percent over the automatic annual adjustment factor contained in its "housing assistance payments" contract.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 108 F.3d 329 (Table). The opinions of the district court (Pet. App. A8-A51) are reported at 927 F. Supp. 75, 869 F. Supp. 133, and 797 F. Supp. 242.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1997. The petition for a writ of certiorari was filed on June 4, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to 42 U.S.C. 1437f, the United States Department of Housing and Urban Development (HUD) helps low-income families obtain adequate housing. Under the federal program at issue in this case, owners of newly constructed housing could obtain mortgages insured by HUD and receive rent assistance payments from the government in return for renting to low-income tenants; each tenant would make rent payments based upon his or her income, and HUD would pay the owner the difference between the tenant's payment and the actual rent.[1] A landlord wishing to participate in the program would enter into a "housing assistance payments" (HAP) contract with HUD. See 42 U.S.C. 1437f(c). Under HUD regulations, each HAP contract was to set forth, among other matters, the amount of rent assistance payments that HUD would make to the landlord, the actual rent for each unit, and the method by which the rent would be adjusted over time. See 24 C.F.R. 880.201 *et seq.* (1979).

2. In 1979, HUD entered into a HAP contract with petitioner Jackson Square Associates, which owned a 160-unit low-income housing development in Amherst, New York. Pet. App. A9-A10. The contract set forth the following rents:

40 one-bedroom units,	$307 per month
60 two-bedroom units,	$341 per month

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[1] In 1983, Congress repealed the new-housing construction program. See Supplemental Appropriations Act, 1984, Pub. L. No. 98-181, § 209, 97 Stat. 1183. That repeal, however, did not affect HUD's obligation to pay rent allowances under existing contracts.

50 three-bedroom units, $390 per month
10 four-bedroom units, $427 per month

Id. at A10. The contract specified two ways in which the prescribed rent could be adjusted. One method provided for increases based on an "Automatic Annual Adjustment Factor" (AAAF) developed by HUD to reflect general economic conditions. See *id.* at A11; see generally *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993). On each anniversary date of the HAP contract, the rents specified in the contract were to be automatically adjusted using the AAAF most recently published in the Federal Register. Pet. App. A11. The other method allowed for a special additional adjustment to reflect increases in actual and necessary expenses incurred by the owner in operating and maintaining the housing units. *Id.* at A14. The owner had the burden of proving that substantial general increases in real property taxes, utility rates, and the like caused "increases in the owner's operating costs *which are not adequately compensated for by automatic annual adjustments.*" *Ibid.* (emphasis omitted in part).

In June 1980, petitioner told HUD that it had substantially underestimated the utility expenses for the common areas of the housing units. Pet. App. A10. It submitted the actual utility costs for the previous 12 months—$64,297.74—and requested a rent increase.[2] *Ibid.* On July 17, 1980, the Buffalo Office

[2] Previously, HUD had estimated that the utility costs for the common areas of the housing units would be about $69,000 per year. Pet. App. A10. Petitioner had disagreed with that estimate and had certified that the costs would be only $19,200 per year. *Ibid.* HUD had adopted petitioner's low estimate because petitioner had represented that it was based on an engineering study. *Ibid.*

prepared an internal proposal addressing petitioner's utility costs. *Id.* at A11. It proposed both a rent increase of $24 per apartment and a higher tenants' utility allowance. *Ibid.* In making those calculations, however, the Buffalo Office did not take into account the fact that, under the AAAF, petitioner had already received an automatic 4.8% rent increase for 1980. *Id.* at A12 n.2.

In an internal memorandum dated August 29, 1980, HUD's Assistant Secretary for Housing adopted the Buffalo Office's proposal and approved the following new rents:

40 one-bedroom units,	$331 per month
60 two-bedroom units,	$365 per month
50 three-bedroom units,	$414 per month
10 four-bedroom units,	$451 per month

Pet. App. A12. That $24 per unit increase entitled petitioner to a six percent overall increase in rents.

3. In October 1980, the Buffalo Office informed petitioner of the new schedule approved by the Assistant Secretary. Pet. App. A13. The final figures were the same as in the Assistant Secretary's memorandum (which petitioner did not see until December 1980), but the Buffalo Office specified that the rent increase incorporated the 4.8% increase based on the AAAF. *Id.* at A13, A32. Petitioner claimed that it was entitled to an additional six percent increase *on top of* the AAAF, for a total increase of 10.8%. *Id.* at A16, A32. In July 1983, the Buffalo Office denied that claim on the ground that, despite petitioner's argument to the contrary, the six percent increase approved in October 1980 was "consistent with [the Assistant Secretary's] memo of August 29, 1980." *Id.* at A32.

In 1988, petitioner again filed a claim with the Buffalo Office for the difference in past and future payments between what it received under the October 1980 increases and what it would have received if it had been granted a 10.8% increase. Pet. App. A32-A33. The Buffalo Office denied the claim, and the Secretary of HUD denied petitioner's administrative appeal. *Id.* at A33.

4. Petitioner next filed suit in district court, claiming breach of contract and violations of the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* (APA). See Pet. App. A30-A31. In 1994, the court granted summary judgment in favor of HUD on the breach-of-contract claim. *Id.* at A33-A37. In 1995, however, the court remanded the case to HUD for further development of the portions of the record relevant to petitioner's APA claim. See *id.* at A18.

In May 1996, the district court granted summary judgment to HUD on that claim as well. The court first rejected petitioner's argument that the Buffalo Office was without authority to treat the 4.8% AAAF for 1980 as incorporated within the $24 per unit rent increase approved by the Secretary. The court observed that the final agency action in this case was the Buffalo Office's July 1983 rent determination, not (as petitioner had argued) the Assistant Secretary's internal memorandum of August 29, 1980. Pet. App. A18-A22. Nothing in the governing statute or regulations, the court added, requires the Assistant Secretary himself to make final rent determinations; although the Assistant Secretary must approve decisions to set rents above 110% (up to a maximum of 120%) of the "fair market" rent, HUD's regional offices retain "authority to depart from the [Secretary's] approved maximum levels." *Id.* at A22. More-

over, the court noted, "the language of the Assistant Secretary himself [in the internal memorandum] seems to contemplate that his approval was just one interim part of the HUD decisionmaking process." *Ibid.*

The court also determined that it was not arbitrary or capricious for HUD to approve a rent adjustment of only 1.2% over the AAAF. Pet. App. A22-A23. Because the plain language of the contract "states that the AAAF must be calculated into any requested special additional adjustments," the court concluded that HUD's decision was reasonable. *Id.* at A23. The court also rejected petitioner's additional allegation that bias against petitioner's president had affected the agency's decision; that decision, the court reasoned, "was not only proper, but was required by * * * the HAP contract," and therefore cannot be said to have resulted from any alleged bias. *Id.* at A24.

5. In a summary order, the court of appeals affirmed the district court's judgment "for substantially the reasons stated by the district court." Pet. App. A3.

ARGUMENT

The unpublished summary decision of the court of appeals was correct, and it does not conflict with any decision of this Court or of another court of appeals. Further review is therefore not warranted.

1. Petitioner first argues (Pet. 7-9) that the district court violated its right to a jury trial under the Seventh Amendment. Petitioner did not raise that claim either in the district court or in the court of appeals, and those courts did not address it; the claim is therefore not properly presented for this Court's review. See, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). In any event, the

claim would be without merit even if it were properly presented. Under principles of sovereign immunity, "[i]t has long been settled that the Seventh Amendment right to trial by jury does not apply in actions against the Federal Government," *Lehman* v. *Nakshian*, 453 U.S. 156, 160 (1981), unless "Congress [has] clearly and unequivocally departed from its usual practice * * * and granted a right to trial by jury," *id.* at 162. Congress granted no such right here. See 5 U.S.C. 702; 42 U.S.C. 1404a.

2. Petitioner next contends that the Buffalo Office improperly "overruled" the Assistant Secretary's August 1980 internal memorandum approving a rent adjustment of $24 per unit. Pet. 10-14. That claim is also without merit. The Buffalo Office in fact implemented the exact rent levels approved by the Assistant Secretary, and that Office's decision to treat those rent levels as incorporating the 1980 AAAF was a proper means of reconciling the Assistant Secretary's internal memorandum with the terms of the HAP contract, see p. 3, *supra*, and with HUD regulations, see 24 C.F.R. 880.110(c) (1979) (special rent adjustments may be granted only to extent that owner's operating costs are not adequately covered by automatic annual adjustments); 24 C.F.R. 880.609(b) (1980) (same).[3]

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[3] Despite petitioner's contrary suggestion (see Pet. 10), *Camp* v. *Pitts*, 411 U.S. 138 (1973), has no relevance here. In *Pitts*, this Court held that, in reviewing agency action, a court may take into account an agency's "contemporaneous explanation" of its decision. See *id.* at 139, 143. The "explanation" that petitioner cites here, however, was not "contemporaneous" with the agency's decision, but appears instead in a deposition (of the Assistant Secretary) taken many years after that decision. See Pet. App. A71 (noting that "I

3. Relying on *Cisneros* v. *Alpine Ridge Group*, 508 U.S. 10 (1993), petitioner also argues that, to justify a "cancellation" of an AAAF benefit, HUD must first conduct a "comparability study" measuring HUD-assisted rents against unassisted rents in the private market. Pet. 15. That contention is also unavailing. HUD did not "cancel" an AAAF benefit. Instead, it granted an AAAF increase and took that increase into account in determining how much of an additional rent increase petitioner needed to cover its operating costs. Nothing in *Alpine Ridge* suggests that, before taking that action, HUD was required to conduct a "comparability study."

4. Finally, there is no merit to petitioner's contention (Pet. 16-17) that bias tainted HUD's decision. As the district court determined (see Pet. App. A24), the agency's decision was in fact "required by * * * the HAP contract," and therefore "any alleged bias on the part of [HUD] is irrelevant to this action." Apart from its erroneous claim that HUD's decision was substantively incorrect, petitioner offers no basis for contesting that determination.

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have no other independent knowledge and no area of recollection except these documents"). Moreover, although the Assistant Secretary testified in that deposition that he had considered his internal memorandum the final action of his office and had anticipated that HUD's staff would follow it, see *id.* at A70-A72, that does not mean that he intended his memorandum to preclude the staff from taking into account either the terms of the contract at issue here or the regulations governing HAP contracts generally.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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